

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 35**

[FRL-6872-1]

RIN 2050-AE33

Technical Assistance Grant Program**AGENCY:** Environmental Protection Agency.**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is publishing today the final rule for the Technical Assistance Grant (TAG) Program under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The Agency has developed a final rule designed to further streamline the TAG program by simplifying application and management procedures, and allowing advance payments up to \$5,000 to new recipients. The intent of this final rule is to make grants for technical assistance more readily available to local community groups and to promote effective public participation in the Superfund cleanup process.

DATES: This final rule is effective October 2, 2000.

ADDRESSES: The official record for this rulemaking is maintained at the Superfund Docket and Document Center, located in Crystal Gateway #1, 1st Floor at the U.S. Environmental Protection Agency, 1235 Jefferson Davis Highway, Arlington, VA, 22202, telephone number 1-703-603-9232. The record is available for inspection, by appointment only, between the hours of 9:00 a.m. to 4:00 p.m. EST, Monday through Friday, excluding legal holidays. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Lois Gartner, Office of Emergency and Remedial Response, 5204-G, U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460 (703) 603-8889 or the RCRA/Superfund Hotline from 9:00 a.m. to 6:00 p.m., Monday through Friday, toll free at 1-800-553-7672 or in the Washington area, 703-412-3323 or TTD 703-412-3323.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

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I. Introduction**A. Authority**

EPA issues this final rule under the authority of section 117(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. 9617(e)). Section 117(e) authorizes the

President to make available Technical Assistance Grants to groups of individuals which may be affected by a release or threatened release at Superfund sites to obtain assistance in interpreting and disseminating information related to site activities. Section 117(e) requires the President to promulgate rules for issuing these grants before processing any grant applications. Executive Order 12580 subsequently delegated to EPA the authority to implement section 117(e).

B. Background of Rulemaking

In 1992, EPA promulgated a final rule to govern the award and administration of TAGs (57 FR 45311 (Oct. 1, 1992)). The Agency based the requirements codified in the final regulation on its early experience with the TAG program and comments generated by the Agency's interim final rule (IFR) (53 FR 9736 (Mar. 24, 1988)), and amendments to the interim final rule (54 FR 49848 (Dec. 1, 1989)). The IFR detailed the specific requirements for obtaining TAGs and enabled EPA to issue grants while it received comments for consideration in development of the final rule. Those comments and practical experience led the Agency to develop a final rule that streamlined the program's application and management procedures reflected in the IFR.

The Agency's experience with the TAG program in the years since it published the 1992 final rule has led the Agency to recognize the need to further streamline TAG application and management procedures. In addition, the Agency also recognized the need to rewrite the TAG regulations in a more readable format to increase accessibility to the program. In August 1999, the Agency published a notice of proposed rulemaking (NPRM) (64 FR 46234 (Aug. 24, 1999)) which set forth the Agency's proposal on how to reduce barriers to TAG participation. The Agency carefully reviewed and gave serious consideration to the comments it received in response to the NPRM. As a result of that review and consideration, the final rule published here today reflects, to the greatest extent possible, the accommodation of many of the comments offered.

II. Explanation of Changes to the Proposed Rule**A. General Changes**

One commenter suggested that EPA include in the final TAG rule a more detailed explanation of the requirements at 40 CFR part 30, in particular how those requirements relate to the TAG rule at 40 CFR part 35, subpart M. The

regulations in both 40 CFR part 30 and part 35, subpart M apply to TAGs. Part 30 establishes uniform administrative requirements for Federal grants and cooperative agreements awarded to institutions of higher education, hospitals, and other nonprofit organizations. Because TAGs are awarded to nonprofit organizations, 40 CFR part 30 applies to all TAGs. Subpart M of 40 CFR part 35 (i.e., the TAG rule) establishes administrative and substantive requirements that apply only to TAGs. EPA included references to and summaries of several of the 40 CFR part 30 requirements in the proposed TAG rule to give recipients a general idea about those regulations.

For example, in § 35.4020, "Is my community group eligible for a TAG?", we have provided a general description of the management structure 40 CFR part 30 requires for groups to be eligible for a TAG. However, the summaries in the TAG rule of 40 CFR part 30 provisions are not intended to be substitutes for 40 CFR part 30. While EPA has established some of the administrative requirements in 40 CFR part 30, the specific sections of 40 CFR part 30 that do not apply to TAGs are listed in § 35.4012. Except for those provisions listed in § 35.4012, the 40 CFR part 30 provisions govern all TAG grants. If there is a conflict between a 40 CFR part 30 provision and a summary of that same provision in the TAG rule, the 40 CFR part 30 provision applies. In order to clarify the relationship between 40 CFR part 30 and part 35, EPA has revised §§ 35.4010 and 35.4011 as follows:

Section 35.4010 What Does This Subpart Do?

This subpart establishes the program-specific regulations for TAGs awarded by EPA.

Section 35.4011 Do the General Grant Regulations for Nonprofit Organizations Apply to TAGs?

Yes, the regulations at 40 CFR part 30 also apply to TAGs. 40 CFR part 30 establishes uniform administrative requirements for Federal grants and agreements to institutions of higher education, hospitals, and other nonprofit organizations. Because EPA awards TAGs to nonprofit organizations, 40 CFR part 30 applies to all TAGs.

B. What Is a Technical Assistance Grant? (§ 35.4005)

One commenter suggested we replace the word "procure" with "hire" when describing the process for communities securing the services of a contractor. The final rule continues to use

"procure" because EPA wants to ensure readers understand there is a competitive procurement process that must be followed when TAG recipients seek a contractor. Moreover, the word "hire" implies that recipients hire a technical advisor as an employee rather than procuring the services of a technical advisor as a contractor.

Another commenter expressed concern that this section does not include any language about using TAG funds for redevelopment purposes. The exclusion of redevelopment as an example of how a technical advisor can assist a group was not intended to imply that technical advisors cannot interpret information regarding redevelopment of the site. Section 35.4005 ("What is a Technical Assistance Grant") provides in part:

A TAG allows your group to procure independent technical advisors to help you interpret and comment on site-related information and decisions. Examples of how a technical advisor can help your group include, but are not limited to:

- (a) Reviewing preliminary site assessment/site investigation data;
- (b) Participating in public meetings to help interpret information about site conditions, proposed remedies, and the implementation of a remedy; and
- (c) Visiting the site vicinity periodically during cleanup, if possible, to observe progress and provide technical updates to your group.

EPA does not believe any change is needed to § 35.4005 to clarify that a technical advisor may assist a group by interpreting information related to redevelopment. Section 35.4005 expressly states that the list of examples of how a Technical Advisor can assist a group is not exhaustive. Furthermore, § 35.4070 provides that technical advisors may help a TAG group understand "the various stages of health and environmental investigations and activities" at a site—a phrase which clearly encompasses redevelopment issues.

C. Is My Community Group Eligible for a TAG? (§ 35.4020)

Several commenters expressed concern about deeming ineligible those groups that receive money or services from a PRP. These commenters suggested communities can benefit from such assistance and that it also is a way to hold PRPs "accountable." While we do not doubt that some forms of PRP assistance can be beneficial to TAG recipients, the final rule continues to consider organizations that receive assistance (services, supplies or money) from PRPs to be ineligible for TAG

funding. Our continued prohibition on PRP assistance exists because we do not believe it is possible to determine when such assistance is given conditionally and, therefore, a group which accepts such assistance may appear to have a conflict of interest undermining its purpose of providing independent technical advice to the affected community.

D. Is There Any Aay My Group Can Get a TAG if It Is Currently Ineligible? (§ 35.4025)

Some commenters expressed support for banning a relationship between a TAG group and national organizations while others argued national organizations offer important benefits to local groups. EPA found the arguments in favor of allowing some kind of relationship between prospective TAG recipients and organizations focused on national issues to be compelling. A central theme to those arguments was that national organizations provide a valuable mentoring benefit to local grassroots organizations like TAG groups.

While we support the concept of some relationship between TAG recipients and national organizations, we also believe the regulatory language in the proposed rule allows for such a relationship. Rather than alter the relevant language in the proposed rule, we believe we need to better clarify what the term "affiliated" means. In the context of this regulation, prospective TAG groups that are "affiliated" with a national organization are not eligible for a TAG. The regulation specifically defines "affiliated" to mean "a relationship between persons or groups where one group, directly or indirectly, controls or has the power to control the other, or, a third group controls or has the power to control both." Thus, for example, a prospective TAG organization that shares any kind of decisionmaking authority about its organizational affairs with any other organization would not be eligible for a TAG. This independence extends to all aspects of the TAG organization including fiduciary decisions—all financial decisions must rest entirely with the prospective TAG organization. Therefore, relationships can exist between TAG organizations and national organizations as long as those relationships do not in anyway impinge on the TAG group's independent decisionmaking authority.

To ensure further clarification of the meaning of "affiliated" as it appears in § 35.4270, "Definitions," we added a parenthetical statement, "(e.g., centralized decisionmaking and

control),” after “interlocking management or ownership.”

E. Can I Be Part of a TAG Group If I Belong to an Ineligible Entity? (§ 35.4030)

A comment related to the eligibility criteria asked for clarification on what this section means when it says EPA may not allow an individual to participate in a TAG organization if EPA determines an individual has a “significant financial involvement in a PRP.” The commenter specifically cited a scenario in which individuals wishing to participate in a TAG organization are employees of the potentially responsible party (PRP) at a site and are homeowners in the town in which the site is located.

The intent of this provision, which is not new to the TAG regulations, is not to exclude employees of a PRP from participating in a TAG group. Rather, the intent is to give EPA the potential right to exclude any individual who EPA finds to own a significant or controlling interest in a PRP. Thus, an employee of a PRP could participate in a TAG organization as long as that individual participated as an affected individual and did not have an interest in a PRP deemed significant or controlling by EPA. The key to this provision is understanding that EPA’s intention is to preclude those individuals who have a significant financial stake or other significant interest in a PRP. While it could easily be argued that employment is, for the individual, financially significant, it is not, in most cases, financially significant to the employer.

F. How Many Groups Can Receive a TAG at One Superfund Site? (§ 35.4040)

Two themes emerged from the comments offered relative to this section. Both comments spoke to EPA’s interpretation of CERCLA section 117. One comment addressed concerns about how EPA has interpreted the word “facility.” A second commenter registered disagreement with EPA’s interpretation of CERCLA to allow for a new recipient to receive TAG funding at a facility after EPA terminates a previous TAG recipient’s agreement at the same facility.

Since the inception of the TAG program, EPA has interpreted the term “facility” in CERCLA section 117 to mean site. The commenter who dissented from this interpretation asserted that “facility” in CERCLA refers to what has evolved into operable units (OUs) and does not mean the entire site. Furthermore, this commenter believes EPA’s interpretation of

“facility” undermines program goals because it does not allow communities affected by specific operable units to have access to TAGs for individual OUs at those sites where the (OUs) are great distances apart and found in separate communities. This commenter wants EPA to allow separate grants for each OU or allow separate grants for communities or municipalities where the OUs of a site are located.

EPA does not agree with the commenter’s interpretation of the term “facility” as used in section 117 of CERCLA. Section 117(e)(1) authorizes EPA to award TAGs “at any facility which is listed on the National Priorities List (NPL) under the National Contingency Plan.” As this language implies, EPA does not list individual operable units on the NPL but facilities which are often referred to as sites. Typically, a site includes more than one operable unit. If EPA were to adopt the interpretation of “facility” as operable unit for purposes of the TAG program and allow every operable unit (e.g., every lagoon, pit, or impoundment at a site) to be eligible for a \$50,000 TAG, then EPA would quickly run out of funding. This interpretation could result in one site with multiple OUs receiving TAG funding for each OU while another site could end up with no TAG funding at all. Furthermore, EPA often does not determine a site’s operable units until long after EPA lists a site on the NPL. If we waited until all operable units were known, communities could be deprived of technical assistance in the early stages of the cleanup action.

EPA is sympathetic to the difficulties that can exist for TAG groups at large Superfund sites where there are several different communities separated by large distances. As explained above, we cannot make multiple grants available for one site. We can, however, provide as much assistance as possible to help disparate communities find ways to work together including the provision of neutral facilitation services when funding for such services exist. (Readers interested in facilitation support should contact their EPA regional TAG contact about the availability of such facilitation services.) Examples exist in the TAG program where several communities affected by large Superfund sites have found ways to work together and address their individual concerns under one grant. We are eager to support other communities in finding the same success.

The second area of comment offered relative to this section took issue with EPA’s interpretation of CERCLA to allow a new group to receive TAG funding at a site after a previous TAG

recipient at the same site ends its participation in the TAG program. This commenter stated that such an interpretation exceeds the statutory limits because section 117(e)(2) of CERCLA provides that “the amount of any grant under this subsection may not exceed \$50,000 for a single grant recipient” and “[n]ot more than one grant may be made under this subsection with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of remedial action.” Furthermore, according to the commenter, if EPA awards a grant to more than one recipient per site, then EPA would also exceed the statutory limitation in section 117(e)(2) on the total amount of funding available to a TAG recipient. Thus, according to the commenter, EPA may renew a TAG, but only to the same recipient and the total sum the recipient can receive (regardless of the number of recipients) is \$50,000, unless EPA waives the funding limit upon a determination that additional funding is necessary to carry out the purposes of section 117.

EPA disagrees. EPA explained its interpretation in the preamble to the proposed TAG rule: “In the administration of this program, EPA has interpreted this provision to mean that there can be only one TAG recipient at a site at any one time during the Superfund process. This interpretation means that if a TAG to one recipient is terminated, EPA can make a new grant to a new recipient. Accordingly, while there can be only one TAG at a time there can be more than one recipient of a TAG at a single facility.” Furthermore, while section 117(e) limits the number of “grants” to one per facility, it does not limit the number of consecutive grant recipients to one per facility. It would be unreasonable for EPA to read such a limitation into the statute, particularly if the result could be that affected communities would have no access to a TAG throughout all stages of the response action. Indeed, such a narrow interpretation would threaten the very purpose of section 117 of CERCLA: to facilitate public participation at Superfund sites. Therefore, the final rule continues to allow for multiple nonconcurrent recipients of TAGs at eligible Superfund sites.

G. What Requirements Must My Group Meet as a TAG Recipient? (§ 35.4045)

EPA received one comment that expressed disagreement with the requirement that groups incorporate as nonprofit organizations, a requirement not new to the proposed rule. The

commenter registered the disagreement on the grounds that “requiring an existing organization to set up a separate ‘shell’ corporation to receive the grant is unfair to the contractor. If the contractor is not paid, he has no legal recourse against the government, and if the grant recipient is a ‘shell’ corporation there is no use suing it because it has no assets.”

This comment fails to consider that the intent of the TAG program generally and the incorporation requirement in particular, is not to secure or advance the legal position of a contractor. Rather, the requirement exists because it benefits both EPA and TAG recipients. As EPA explained in the preamble to the 1988 interim final rule:

“... incorporation offers advantages to both recipients and EPA, and does so at relatively little cost to both. Incorporation protects individual group members from potentially serious personal liability problems that may result if the technical assistance grant is awarded to a group or organization that is not incorporated. It also reduces or eliminates problems that might otherwise arise from the departure of any individual from the recipient group, if it lacked the structure created by incorporation. EPA also benefits from awarding every grant to a group with the same legal status: a corporation with bylaws, officers and official purposes.”

EPA believes the benefits outlined in the 1988 rule continue to exist, and therefore, the final rule continues to require groups to incorporate as nonprofit organizations.

The provisions in this section prohibiting TAG groups from restricting access by requiring membership dues or other means garnered both supporting and dissenting comments. Specifically, some commenters supported the idea of prohibiting TAG groups from restricting access by requiring membership dues or other means. Others expressed concern that such a prohibition could undermine the financial abilities of an organization.

EPA considered ways to accommodate both viewpoints expressed by commenters. We concluded, however, that we should not involve EPA in this level of TAG group operation. We determined that our regulation in this area should focus on making certain that groups are and remain eligible under § 35.4020 and that they administer their grant according to the provisions of their grant agreement. Therefore, we have removed § 35.4045(c) which stated groups could not restrict access by charging membership fees or by using other means to limit participation. TAG groups, however, are still obligated pursuant to § 35.4140 to disseminate information to the affected community.

H. Must My Group Contribute Toward the Cost of a TAG? (§ 35.4050)

Many commenters expressed satisfaction with EPA’s decision to eliminate the “good faith” requirement for those communities seeking a waiver of the 20 percent cost share requirement. One commenter expressed support for EPA giving TAG groups the option to not provide a cost share altogether. Other commenters suggested that calculating the cost share as a part of the reimbursement process is onerous and confusing.

The cost share requirement is a statutory one and, therefore, is not a requirement EPA can eliminate through the TAG regulation. We can, and believe that this regulation does, make it easier for those groups who are financially disadvantaged to receive a waiver to the matching share requirement. We are also concerned about the burden associated with the cost share calculation tied to the reimbursement process. However, we do not believe the TAG rule is the appropriate place to address those concerns. Rather, we intend to provide guidance to recipients on how to calculate and account for the cost share throughout the life of the grant in the forthcoming revised TAG guidance. EPA is currently developing new guidance for both the regions and recipients, and anticipates having the guidance ready for distribution in early 2001.

I. How Can My Group Get More Than \$50,000? (§ 35.4065)

This section elicited several comments about expanding the grounds for giving TAG recipients additional funding after they have expended the original award amount. Specifically, one commenter suggested that EPA should automatically grant a recipient a renewal of \$50,000 after the first year without restriction if the recipient properly expended the first award amount. Another commenter suggested EPA add, as a reason why a site merits additional funding, the issuance of an “Explanation of Significant Differences” (ESD) by the agency leading the cleanup. Two other comments were also offered relative to this section. One commenter asked for clarification on what the ultimate cap is on the amount a recipient may receive, while the other registered disagreement about the fact that existing recipients can receive additional funding without having to compete with other community groups that are interested in obtaining a TAG.

Because of the underlying sentiment present in several of the comments tied to this section—that EPA should make

additional funding easier—EPA has made changes to “How can my group get more than \$50,000?” One change is that an ESD will now be another site condition factor that may merit additional funding for a site. This change means an ESD will be one of ten possible factors to be considered when groups want funding above the \$50,000 level. Recipients will still have to demonstrate the presence of at least three of these ten factors and will also have to demonstrate effective management of previous awards.

A second change to ease funding is that the final rule contains no specific limit on how much money can be awarded to a TAG recipient. This change makes the regulation consistent with CERCLA, which contains no cap on the amount a TAG recipient can receive. The change also means EPA regional offices will have complete authority over the decision to fund TAGs above \$50,000 and therefore, the waiver process will be accomplished more quickly. While the final rule contains no pre-determined limit on funding amounts, requests for waivers to the \$50,000 limit will still have to meet the conditions found in § 35.4065. Also, such requests will be subject to the availability of funds.

EPA cannot automatically award grantees an additional \$50,000 after the first year if the group managed its first funding amount effectively. Under section 117(e)(2) of CERCLA, the \$50,000 limit may be waived “where such waiver is necessary to carry out the purposes of this subsection.” Thus, CERCLA requires EPA to make a determination that the waiver is necessary to carry out the purposes of section 117(e). Since a waiver may not in all instances be necessary after the first year, it would not be reasonable to provide an automatic waiver after one year. A waiver after one year is possible under the final rule if three of the ten site condition factors exist and the recipient has effectively managed previously awarded funds, but most TAG groups will not need a waiver at that time since they will still have unexpended funds under the initial grant. (Even though funding periods may be negotiated, EPA believes most recipients will want funding periods that are longer than one year).

The last subject touched upon by comments on this section was offered by a commenter who believes allowing a TAG recipient to seek additional funding without starting the competitive award process over again is unfair. This commenter also took issue with the Agency’s assertion in the preamble to the proposed rule that there is usually

only one applicant per site. In the case of the Superfund site affecting the commenter, there are three groups active at the site. One group is a TAG recipient that has received funding above \$50,000. The commenter feels the other two groups have been "shut out" because EPA does not allow competition when a site is eligible for additional funding.

This comment speaks to a scenario that has occurred in the TAG program over the past several years in which groups that did not apply for a grant when one was available take issue with the Agency's selection of a recipient. The Agency has decided not to change the rule to require another competition. Empirical evidence shows that the majority of TAGs awarded have involved sites where only one group submitted an application. Nonetheless, EPA recognized, when structuring the program, that there may be situations where there is more than one eligible candidate for a TAG. This recognition led the Agency to adopt an award procedure which includes advertising TAG availability to the broad community, encouraging the formation of coalitions where there are multiple interested parties and, when coalitions are unable to form, allowing for a competitive process to select one recipient. While the Agency can advertise TAGs, encourage potential applicants to apply, and facilitate the formation of coalitions, ultimately, the decision to apply for a grant must be made by organizations themselves.

Because we are anxious to see, to the greatest extent possible, multiple groups coalesce, EPA regional offices may, in some instances, provide neutral facilitation and dispute resolution services. These services could be used to build a consensus among groups unable to form coalitions on their own. Readers interested in this possible resource should contact their EPA regional office.

J. How Can My Group Spend TAG Money? (§ 35.4070)

As with the similar comment offered with respect to § 35.4005, "What is a TAG?", a commenter expressed concern that this section does not contain a specific reference to redevelopment as an acceptable focus of a TAG recipient. EPA believes the use of TAG funds for technical assistance in interpreting information regarding redevelopment at the site falls under the description of general activities found in this section. We have not modified this section of the final rule to explicitly include this activity, but § 35.4190, "How does my group identify a qualified technical

advisor?" contemplates the use of TAG funds for technical assistance in interpreting information regarding redevelopment at the site by including the types of qualifications a redevelopment technical advisor must and should possess. Also, § 35.4005 contains an example of how a technical advisor might assist a community in interpreting information regarding redevelopment at a site.

K. Are There Things My Group Can't Spend TAG Money for? (§ 35.4075)

The Agency received several comments suggesting that TAG funds be available for various kinds of TAG recipient training. For example, one commenter suggested that TAGs should be able to fund health and safety training using TAG monies. When drafting the proposed rule, EPA considered this issue and concluded that since section 117(e) of CERCLA only authorizes grants "to obtain technical assistance in interpreting information" regarding the site, and since health and safety training for the members of the group is not necessary in order for the group to procure technical assistance, such training is not an eligible TAG expenditure. Furthermore, even if the statute could be interpreted broadly enough to permit training of TAG members, EPA does not believe it would be a wise use of limited TAG funds. Allowing community members to receive training so that they could, in essence, act as their own advisors would be costly. Furthermore, it is improbable that such training by itself would provide members with the level of expertise that a technical advisor must have under § 35.4190. EPA also believes allowing community training would be fraught with administrative problems such as: Which community members could take training? What kind of training would be allowable? Given the statutory limitation and the administrative difficulties, EPA is maintaining the prohibition that communities cannot use TAG funds for training.

However, EPA supports providing community members with educational opportunities through other avenues. One avenue that EPA has been pursuing is the development of a series of short educational workshops on topics such as an overview of CERCLA and risk assessments. EPA hopes efforts such as these workshops will enable community members to maximize their participation in decisionmaking at their site without using TAG funds.

Another commenter suggested that EPA allow group members to be reimbursed for fuel and other travel

expenses (e.g., meals and incidentals) per diem when traveling great distances to attend meetings (for example, when a trip is more than 60 miles round trip). EPA has explicitly prohibited the use of TAG funds for recipient group members' travel since publication of the first rule governing TAGs (§ 35.4055(a)(5) of the Interim Final Rule, 53 FR 9736, 9750 (March 24, 1988) and the Final Rule, 57 FR 45311, 45318-19 (October 1, 1992). EPA continues in this final rule to prohibit fuel and per diem expenses as allowable expenses. Our rationale for this prohibition is that such expenses are inconsistent with the cost principles stated in the Office of Management and Budget (OMB) Circular A-122, and, as EPA stated in the 1988 interim final rule,

"EPA believes that the primary purpose of the technical assistance grant is to assist citizens' groups in obtaining technical assistance and not to fund ancillary activities of the grant recipient such as travel and training, which, by reducing available funds, would detract from or limit the recipient's ability to obtain technical advice regarding remedial actions."

Finally, one commenter on this section stated that the flat prohibition on primary data gathering is wasteful and serves no useful purpose. EPA disagrees and points readers to the explanation as to why generation of new primary data is not allowable found in the preamble to the Interim Final Rule, 53 FR 9736, 9750 (March 24, 1988):

"Costs associated with the generation of new primary data are not allowable because this would be inconsistent with Congressional intent of "interpreting information." In addition, developing new primary data, such as sampling data, would be so costly as to diminish the recipient's ability to obtain technical assistance throughout the entire cleanup process."

L. Can My Group Get an "Advance Payment" To Help Us Get Started? (§ 35.4085)

Comments offered on the provision for limited advance payments were all positive about the inclusion of the payment provision. However, one commenter opined that \$2000, rather than \$5000, was sufficient for covering start-up costs. Despite the concerns of this one commenter, the final rule maintains the \$5000 amount. EPA has changed, however, the requirement that only new groups lacking sufficient resources will be eligible for advance funding: the final rule allows any new recipient to request advance payment up to \$5000. This change does not alter the requirement that recipients need to request such funding in writing and identify what activities, goods or

services they need. It also does not alter the limitations on what items can be purchased: in particular the final rule continues to prohibit the use of advance funding to pay for any kind of contractual services and for the costs of incorporation.

M. How Much Time Do My Group or Other Interested Groups Have To Submit a TAG Application to EPA? (§ 35.4120)

One commenter asked that the deadline for submitting an application (within 60 days from the time the first LOI is submitted) be extended for groups lacking human resources. Another commenter expressed confusion about the deadlines for different parts of the application process. Both of these comments suggest to EPA that the proposed rule's explanation of the time frame for the application process was confusing.

Based on the comments we received, we made substantive and editorial changes to this section. We changed the final rule by explaining that the first important time period for community groups is 30 days from the date EPA publishes a public notice informing the broader community that it has received an LOI. During this first 30 days, other groups interested in obtaining a TAG will either have to form a coalition with other interested groups or submit their own individual LOIs. The next important time period is the 30-day period in which all groups must submit their applications to EPA; it begins on the first day after the first 30-day period ends. Therefore, EPA must receive all applications within the 60 days after the public notice appears in paper. Only those groups that submitted LOIs in the first 30-day period will be eligible to submit applications. The time period for preparing applications can be extended if any group that submitted an LOI writes EPA requesting an extension. If an extension is granted, all groups that submitted an LOI will be able to take advantage of the extension.

We have also further clarified the application process in the final rule by providing a time frame in which the entire application process must end. We have added this additional information because we have found over the years that many groups will submit an application within the necessary time frame but the applications will be deficient in some way. EPA typically works with such applicants by providing extensive written comments about what changes need to be made to the application to make it complete. However, many groups will take months to finalize their applications by

incorporating EPA's comments. While EPA does not want to penalize those groups who have made a good faith effort at completing the application on their first try, we also believe allowing the time in which groups finalize their applications to drag on indefinitely is unfair to the broader community. Therefore, we have added to the final rule a provision allowing groups 90 days to correct any deficiencies in their application that EPA has identified to them in writing. This 90-day period begins from the date of the letter in which EPA explains what changes an application requires. Thus, EPA will be able to begin its award decision process no later than the end of the 90-day period, or, if EPA does not receive a complete application in that 90-day period, then EPA will readvertise TAG availability and the award process will begin again.

N. How Does My Group Identify a Qualified Technical Advisor? (§ 35.4190)

EPA received mixed opinions about the level of specificity in the provision regarding the technical advisor qualifications. One commenter suggested the criteria for technical advisors should be very specific while others suggested the criteria needed to be very broad and flexible. EPA believes the qualifications laid out in the proposed rule are satisfactory in that they establish a minimum of necessary qualifications without being so restrictive that recipients have no flexibility in identifying what they perceive to be their community's unique technical advisor needs. Therefore, the final rule maintains the technical advisor qualifications found in the proposed rule except for a change to the public health technical advisor requirements, a description of which follows.

The change to the public health technical advisor qualifications concerns the requirement that such advisors must be associated with accredited schools of medicine, public health or accredited academic institutions of other allied disciplines. A commenter expressed concern that this requirement might exclude well-qualified public health experts. EPA agrees, and we removed the requirement. We do continue to require, however, that public health technical advisors must have received their training at such institutions. Despite the removal of the current association with accredited institutions requirement, we would like to suggest to TAG recipients seeking assistance in public health issues to consider accredited schools of

medicine, public health or accredited academic institutions of other allied disciplines to be potentially good resources for public health technical advisors.

O. Are There Certain People My Group Cannot Select To Be Our Technical Advisor, Grant Administrator or Other Contractor Under the Grant? (§ 35.4195)

A commenter recommended that if the word "person" in § 35.4195 refers only to individuals (i.e., not entities that might be considered juridical persons, such as corporations), then it should be explicitly stated in the rule. Section 35.4195(a) specifies the "people" who cannot be hired as a TAG group's technical advisor, grant administrator, or other contractor under the grant. It excludes "persons" who wrote the specifications for the contract; in the case of a technical advisor, it excludes "anyone" doing work for the Federal or state government or any other entity at the site; and "anyone" who is on the List of Parties Excluded from federal Procurement or NonProcurement Programs. EPA believes that the purposes of this provision would not be served if the organization employing the individuals excluded as contractors by this provision were not also excluded. Therefore, we have revised § 35.4195 to make it clearly applicable to persons, businesses, nonprofit organizations, and any other entity.

P. What Restrictions Apply to Contractors My Group Procures for Our TAG? (§ 35.4200)

The provision in this section that limits the use of relocation technical advisors to those situations where EPA is seriously considering relocation drew criticism from commenters to the proposed rule. Several organizations who commented on EPA's "National Superfund Permanent Relocation Interim Policy" (64 FR 37012 (July 8, 1999)), which references the TAG rule's "seriously considering" provision, also expressed concern about it. Both sets of commenters took issue with what they perceived to be the rule's lack of consideration about whether a community wants to be relocated.

We agree with commenters that the proposed rule's "seriously considering" provision limits the ability of a community to consider permanent relocation with TAG funds. In reconsidering the provision and the comments we received on it, we have determined that relocation should not be treated differently than any of the other matters for which TAG groups may obtain technical assistance. Accordingly, in the final rule we have

eliminated the requirement that EPA must be seriously considering relocation in order for TAG groups to look at permanent relocation. EPA's preference, however, continues to be to address the risks posed by contamination by using well-designed methods of cleanup which allow people to remain safely in their homes and businesses. This preference is consistent with the mandates of CERCLA and the implementing requirements of the NCP, which emphasize selecting remedies that protect human health and the environment, maintain protection over time, and minimize untreated waste. Therefore, although the final rule does not restrict the circumstances in which TAGs may be used to obtain technical assistance regarding relocation, EPA expects that TAG groups will choose not to spend their limited TAG funds obtaining technical assistance on relocation unless there is a reasonable possibility that relocation will be selected as a remedy.

Q. How Does My Group Procure a Technical Advisor or Any Other Contractor? (§ 35.4205)

EPA received a comment suggesting a time limit on the amount of time EPA could spend reviewing contracts. The commenter said that limit should be 15 days. Section 35.4205 requires TAG groups to provide EPA the opportunity to review a contract before the group awards or amends it. The purpose of this provision is to help recipients—many of whom do not have experience awarding a contract under a grant. While EPA is not a party to the contract, EPA wants to help recipients award contracts that are consistent with the TAG statute and regulations. This assistance is particularly important for TAG grantees, which are often small organizations. If the TAG group awards a contract for activities that are not eligible under the regulations, for example, the TAG group may not use TAG funds to pay the contractor for that activity and the TAG group may not have another available source of funding for the contract. On the other hand, EPA recognizes that contract review by EPA may sometimes delay the award of a contract.

EPA does not believe, however, that the regulation should specify a time limit on EPA's review. EPA does not want to suggest that the contract is "approved" by EPA as a result either of EPA review or a lapse of time during which EPA had the opportunity to review it. The regulation does not require EPA review or approval of the TAG group's contract; it only requires the recipient to give EPA an opportunity

to review the contract. If the recipient provides EPA the opportunity to review the contract, then the recipient will have complied with the regulation (as long as the amount of time given to EPA is reasonable under the circumstances) even if EPA has not actually reviewed it or provided the recipient with any comments on it. EPA, however, strongly encourages TAG groups to work with their project officer to come up with an appropriate time frame for reviewing contracts in order for groups to avoid becoming liable for all or portions of a contract that EPA cannot reimburse under the grant. EPA expects to provide suggestions for how TAG groups and regional offices can coordinate and streamline this review process in forthcoming TAG program guidance.

R. How Does My Group Ensure a Prospective Contractor Does Not Have a Conflict of Interest? (§ 35.4220)

A commenter suggested that the phrase "pending litigation, with such parties" should be clarified to exclude participation in unrelated litigation on the opposite side of a PRP because there is no conflict of interest in such a situation. Section 35.4220(a) provides that in order to ensure that a contractor does not have a conflict of interest, your group must require any prospective contractor to provide, with its bid or proposal information on its financial and business relationships with all PRPs at the site, including "services related to any proposed or pending litigation, with such parties." EPA agrees that it is unlikely that a contractor involved in unrelated litigation on the opposite side of a PRP would have a conflict of interest. Therefore, EPA is revising this section to apply (in part) to "financial and business relationships with such parties, and services provided to or on behalf of such parties in connection with any proposed or pending litigation."

S. Definitions (§ 35.4270)

In our efforts to clarify the meaning of "affiliated," especially as it pertains to the relationship between TAG groups and large national organizations, we modified the definition of "affiliated" by inserting a parenthetical statement, "(i.e., centralized decisionmaking and control)," after "interlocking management or ownership."

We have also added definitions for the terms "Explanation of Significant Differences" (ESD) and "National Contingency Plan" (NCP). We added ESD because it is now one of ten site factors that can be the basis for funding a TAG above \$50,000. We included the

term NCP in the "Definitions" because it is part of the definition for ESD.

T. Existing Grants

One commenter expressed an opinion that EPA should require all current TAGs to be administered under the new regulations in order to allow communities to benefit from the changes in the revised rule. Generally, for substantive requirements applicable to grants, EPA and the grantee must follow the regulations that were in effect at the time of the grant award. For ease of administration for current TAG recipients, EPA will continue to apply all provisions of the TAG regulations that were in effect at the time of award. Recipients of TAGs under previous regulations may request that their grants be administered under this regulation once it is final. Groups wishing to be administered under the new regulations must write EPA and request that their grant agreements be amended by the Award Official. However, any funds spent prior to the finalization of this rule are subject to the previous regulation. Amendments to current grants will apply only to future work.

U. State Administration

EPA proposed to move State administration of the TAG program to another regulation, 40 CFR part 35, subpart O, which is the regulation governing the award of cooperative agreements to States and Indian tribes under section 104(d) of CERCLA. However, EPA has decided to eliminate altogether the ability of States to administer the TAG Program. We base this decision on several factors. One factor is that several commenters strongly opposed giving States the ability to administer the program. Another factor is that, since 1988, States have had the option of administering the program yet none have. This lack of implementation suggests to EPA that States are not interested in administering the TAG program. Also, while we specifically solicited the input of several State organizations on our proposal, none of them responded. Furthermore, at sites where the State is a potentially responsible party, there is the potential for the community to perceive that the State is not administering the TAG grant in a disinterested manner. Therefore, this final rule does not contain provisions for the States to administer the TAG Program and EPA does not intend to include such provisions in other regulatory actions.

III. Regulatory Analysis

A. Regulatory Flexibility Act (RFA as Amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.)

Today's final rule is not subject to the RFA, which generally requires an agency to prepare a regulatory flexibility analysis of any rule that will have a significant economic impact on a substantial number of small entities. The RFA only applies to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule pertains to grants which the APA expressly exempts from notice-and-comment rulemaking requirements. 5 U.S.C. 553(a)(2). Moreover, section 117 of CERCLA does not require EPA to issue a notice of proposed rulemaking.

Although not subject to the RFA, EPA, nonetheless, considered the potential of this final rule to adversely impact small entities subject to the rule. EPA concluded that this rule does not adversely impact small entities because it includes requirements that are imposed only on those entities that voluntarily apply for a grant and are the minimum necessary to ensure that grants are awarded and used only for authorized purposes. In addition, EPA solicited input and comment on the proposed rule from small entities by sending it to current grant recipients and their technical advisors, and by publishing a notice of proposed rulemaking even though grant related rules are not required to undergo notice-and-comment rulemaking.

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This regulation contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The UMRA excludes from the definition of "Federal intergovernmental mandate" duties that arise from conditions of federal assistance.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments because this rule does not impose any requirements on any governments.

C. National Technology Transfer and Advancement Act

As noted in the proposed rule, section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

EPA believes that this final rule does not involve any technical standards subject to NTTAA. In the proposed rule, EPA requested anyone who disagreed with this conclusion to indicate why the rule is subject to the Act and to identify

any potentially applicable and voluntary consensus standards. EPA received no comments on this matter.

D. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 applies to any rule that is determined to be: (1) "Economically significant" as defined under Executive Order 12866; and (2) Concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

E. Paperwork Reduction Act

In keeping with the requirements of the Paperwork Reduction Act (PRA) as amended, 44 U.S.C. 3501 *et seq.*, the information collection requirements contained in this rule have been approved by the Office of Management and Budget under information request number 2030-0020. This rule does not contain any collection of information requirements beyond those already approved. Since this action imposes no new or additional information collection, reporting or record keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, no information request will be submitted to the Office of Management and Budget for review.

F. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

G. Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255 (August 10, 1999)), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule. Further, because this rule regulates the use of federal financial assistance, it will not impose substantial direct compliance costs on the States.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and States, EPA sent the proposed regulation with a request for comments to several organizations that represent states, including the National Governors Association and the National Conference of State Legislatures.

H. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance

costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input" in the development of regulatory policies on matters that significantly or uniquely affect their communities.

This final rule does not significantly or uniquely affect the communities of Indian Tribal governments. This rule does not apply to tribes; rather, it governs the award of technical assistance grants to non-profit corporations. Accordingly, the requirements of section 3 (b) of Executive Order 13084 do not apply.

I. Executive Order 12898

Under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," as well as through EPA's April 1995, "Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report," and National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities.

No action from the final rule will have a disproportionately high and adverse human health and environmental effects on any segment of the population. In addition, the final rule does not impose substantial direct compliance costs on those communities. Accordingly, the

requirements of the Executive Order do not apply.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by U.S.C. 804(2). This action will be effective October 2, 2000.

List of Subjects in 40 CFR Part 35

Environmental protection, Air pollution control, Coastal zone, Grant programs—environmental protection, Grant programs—Indians, Hazardous waste, Indians, Intergovernmental relations, Pesticides and pests, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: September 13, 2000.

Carol M. Browner,
Administrator.

Accordingly, as set forth in the preamble, the Environmental Protection Agency amends 40 CFR part 35 as follows:

PART 35—STATE AND LOCAL ASSISTANCE

1. The authority citation for part 35 is revised to read as follows:

Authority: 42 U.S.C. 4368b, unless otherwise noted.

2. Subpart M is revised to read as follows:

Subpart M—Grants for Technical Assistance

General

Sec.

35.4000 Authority.

35.4005 What is a Technical Assistance Grant?

35.4010 What does this subpart do?

35.4011 Do the general grant regulations for nonprofit organizations apply to TAGs?

35.4012 If there appears to be a difference between the requirements in 40 CFR part 30 and this subpart, which regulations should my group follow?

- 35.4015 Do certain words in this subpart have specific meaning?
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- 35.4025 Is there any way my group can get a TAG if it is currently ineligible?
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- 35.4140 What must be included in my group's work plan?
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- 35.4160 What does EPA do if more than one group applies for a TAG at the same site?
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- 35.4170 What kinds of reporting does EPA require?
- 35.4175 What other reporting and record keeping requirements are there?
- 35.4180 Must my group keep financial records after we finish our TAG?
- 35.4185 What does my group do with reports our technical advisor prepares for us?
- Procuring a Technical Advisor or Other Contractor With TAG Funds
- 35.4190 How does my group identify a qualified technical advisor?
- 35.4195 Are there certain people my group cannot select to be our technical advisor, grant administrator, or other contractor under the grant?
- 35.4200 What restrictions apply to contractors my group procures for our TAG?
- 35.4205 How does my group procure a technical advisor or any other contractor?
- 35.4210 Must my group solicit and document bids for our procurements?
- 35.4215 What if my group can't find an adequate number of potential sources for a technical advisor or other contractor?
- 35.4220 How does my group ensure a prospective contractor does not have a conflict of interest?
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- 35.4230 What are my group's contractual responsibilities once we procure a contractor?
- 35.4235 Are there specific provisions my group's contract(s) must contain?
- Requirements for TAG Contractors
- 35.4240 What provisions must my group's TAG contractor comply with if it subcontracts?
- Grant Disputes, Termination, and Enforcement
- 35.4245 How does my group resolve a disagreement with EPA regarding our TAG?
- 35.4250 Under what circumstances would EPA terminate my group's TAG?
- 35.4255 Can my group terminate our TAG?
- 35.4260 What other steps might EPA take if my group fails to comply with the terms and conditions of our award?
- Closing Out a TAG
- 35.4265 How does my group close out our TAG?
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- 35.4270 Definitions.
- 35.4275 Where can my group get the documents this subpart references (for example, OMB circulars, other subparts, forms)?

Subpart M—Grants for Technical Assistance

Authority: 42 U.S.C. 9617(e); sec. 9(g), E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

General

§ 35.4000 Authority.

The Environmental Protection Agency ("EPA") issues this subpart under section 117(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. 9617(e).

§ 35.4005 What is a Technical Assistance Grant?

A Technical Assistance Grant (TAG) provides money for your group to obtain technical assistance in interpreting information with regard to a Superfund site. EPA awards TAGs to promote public participation in decision making at eligible sites. A TAG allows your group to procure independent technical advisors to help you interpret and comment on site-related information and decisions. Examples of how a technical advisor can help your group include, but are not limited to:

- (a) Reviewing preliminary site assessment/site investigation data;
- (b) Participating in public meetings to help interpret information about site conditions, proposed remedies, and the implementation of a remedy;
- (c) Visiting the site vicinity periodically during cleanup, if possible, to observe progress and provide technical updates to your group; and
- (d) Evaluate future land use options based on land use assumptions found in the "remedial investigation/feasibility study."

§ 35.4010 What does this subpart do?

This subpart establishes the program-specific regulations for TAGs awarded by EPA.

§ 35.4011 Do the general grant regulations for nonprofit organizations apply to TAGs?

Yes, the regulations at 40 CFR part 30 also apply to TAGs. 40 CFR part 30 establishes uniform administrative requirements for Federal grants and agreements to institutions of higher education, hospitals, and other nonprofit organizations. Because EPA awards TAGs to nonprofit organizations, 40 CFR part 30 applies to all TAGs.

§ 35.4012 If there appears to be a difference between the requirements in 40 CFR part 30 and this subpart, which regulations should my group follow?

You should follow the regulations in 40 CFR part 30, except for the following

provisions from which this subpart deviates:

- (a) 40 CFR 30.11, Pre-Award Policies;
- (b) 40 CFR 30.22 (b) and (c), Payment;
- (c) 40 CFR 30.44 (e) (2), Procurement Procedures;
- (d) 40 CFR 30.53 (b), Retention and Access Requirements for Records; and
- (e) 40 CFR 31.70 (c) and 31.70 (i) as referenced by 40 CFR 30.63, Disputes.

§ 35.4015 Do certain words in this subpart have specific meaning?

Yes, some words in this subpart have specific meanings that are described in § 35.4270, Definitions. The first time these words are used they are marked with quotation marks, for example, "EPA."

Who Is Eligible?

§ 35.4020 Is my community group eligible for a TAG?

(a) Yes, your community group is eligible for a TAG if:

(1) You are a group of people who may be "affected" by a release or a threatened release at any facility listed on the National Priorities List ("NPL") or proposed for listing under the National Contingency Plan (NCP) where a "response action" under CERCLA has begun;

(2) Your group meets the minimum administrative and management capability requirements found in 40 CFR 30.21 by demonstrating you have or will have reliable procedures for record keeping and financial accountability related to managing your TAG (you must have these procedures in place before your group incurs any expenses); and

(3) Your group is not ineligible according to paragraph (b) of this section.

(b) No, your community group is not eligible for a TAG if your group is:

(1) A "potentially responsible party" (PRP), receives money or services from a PRP, or represents a PRP;

(2) Not incorporated as a nonprofit organization for the specific purpose of representing affected people except as provided in § 35.4045;

(3) "Affiliated" with a national organization;

(4) An academic institution;

(5) A political subdivision (for example, township or municipality); or

(6) Established or presently sustained by ineligible entities that paragraphs (b) (1) through (5) of this section describe, or if any of these ineligible entities are represented in your group.

§ 35.4025 Is there any way my group can get a TAG if it is currently ineligible?

You can make your group eligible by establishing an identity separate from

that of the PRP or other ineligible entity by making a reasonable demonstration of independence from the ineligible entity. Such a demonstration requires, at a minimum, a showing that your group has a separate and distinct:

(a) Formal legal identity (for example, your group has different officers); and

(b) Substantive existence (meaning, is not affiliated with an ineligible entity), including its own finances.

(1) In determining whether your group has a different substantive existence from the ineligible entity, you must establish for us that your group:

(i) Is not controlled either directly or indirectly, by the ineligible entity; and

(ii) Does not control, either directly or indirectly, an ineligible entity.

(2) You must also establish for EPA that a third group does not have the power to control both your group and an ineligible entity.

§ 35.4030 Can I be part of a TAG group if I belong to an ineligible group?

You may participate in your capacity as an individual in a group receiving a TAG, but you may not represent the interests of an ineligible entity.

However, we may prohibit you from participating in a TAG group if the "award official" determines you have a significant financial involvement in a PRP.

§ 35.4035 Does EPA use the same eligibility criteria for TAGs at "Federal facility" sites?

Yes, EPA uses the same criteria found in § 35.4020 in evaluating the eligibility of your group or any group of individuals who may be affected by a release or a threatened release at a Federal facility for a TAG under this subpart.

§ 30.4040 How many groups can receive a TAG at one Superfund site?

(a) Only one TAG may be awarded for a site at any one time. However, the recipient of the grant can be changed when:

(1) EPA and the recipient mutually agree to terminate the current TAG or the recipient or EPA unilaterally terminates the TAG; or

(2) The recipient elects not to renew its grant even though it is eligible for additional funding.

(b) In each of the situations described in paragraph (a) of this section the following information applies:

(1) If you are a subsequent recipient of a TAG, you are not responsible for actions taken by the first recipient, nor are you responsible for how the first recipient expended the funds received from EPA; and

(2) The process for changing recipients begins when an interested applicant submits a Letter of Intent ("LOI") to the Agency expressing interest in a TAG as described in § 35.4105. We will then follow the application procedure set forth at §§ 35.4105 through 35.4165.

Your Responsibilities as a TAG Recipient

§ 35.4045 What requirements must my group meet as a TAG recipient?

Your group, including those groups which form out of a coalition agreement, must incorporate as a nonprofit corporation for the purpose of participating in decision making at the Superfund site for which we provide a TAG. However, a group that was previously incorporated as a nonprofit organization and includes all individuals and groups who joined in applying for the TAG is not required to reincorporate for the specific purpose of representing affected individuals at the site, if in EPA's discretionary judgment, the group has a history of involvement at the site. You must also:

(a) At the time of award, demonstrate that your group has incorporated as a nonprofit organization or filed the necessary documents for incorporation with the appropriate State agency; and

(b) At the time of your first request for reimbursement or advance payment, submit proof that the State has incorporated your group as a nonprofit organization.

§ 35.4050 Must my group contribute toward the cost of a TAG?

(a) Yes, your group must contribute 20 percent of the total cost of the TAG project unless EPA waives the match under § 35.4055.

(b) Under 40 CFR 30.23, your group may use "cash" and/or "in-kind contributions" (for example, your board members can count their time toward your matching share) to meet the matching funds requirement. Without specific statutory authority, you may not use Federal funds to meet the required match.

§ 35.4055 What if my group can't come up with the "matching funds"?

(a) EPA may waive all or part of your matching funds requirement if we:

(1) Have not issued the "Record of Decision" ("ROD") at the last "operable unit" for the site (in other words, if EPA has not already made decisions on the final cleanup actions at the site); and

(2) Determine, based on evidence in the form of documentation provided by your group, that:

(i) Your group needs a waiver because providing the match would be a financial hardship to your group (for example, your local economy is depressed and coming up with in-kind contributions would be difficult); and

(ii) The waiver is necessary to help your community participate in selecting a remedial action at the site.

(b) If your group receives a waiver of the matching funds after your initial award, your grant agreement must be amended.

How Much Money TAGs Provide

§ 35.4060 How much money can my group receive through a TAG?

The following table shows how much money your group can receive through a TAG:

| If your group is . . . | Then your initial award will . . . |
|---|---|
| (a) the first recipient of a TAG at a site or a subsequent recipient at a site where the initial recipient spent the entire award amount. | not exceed \$50,000 per site. |
| (b) a subsequent recipient at a site with remaining funds from an initial \$50,000 award. | be the unspent amount remaining from an initial from the initial award (for example, if the Agency awarded the first recipient \$50,000 but that recipient only spent \$27,000, then your group's initial award would be \$23,000). |

§ 35.4065 How can my group get more than \$50,000?

(a) The EPA regional office award official for your grant may waive your group's \$50,000 limit if your group demonstrates that:

(1) If it received previous TAG funds, you managed those funds effectively; and

(2) Site(s) characteristics indicate additional funds are necessary due to the nature or volume of site-related information. In this case, three of the ten factors below must occur:

(i) A Remedial Investigation/Feasibility Study ("RI/FS") costing more than \$2 million is performed;

(ii) Treatability studies or evaluation of new and innovative technologies are required as specified in the Record of Decision;

(iii) EPA reopens the Record of Decision;

(iv) The site public health assessment (or related activities) indicates the need for further health investigations and/or health promotion activities;

(v) EPA designates one or more additional operable units after awarding the TAG;

(vi) The agency leading the cleanup issues an "Explanation of Significant Differences" (ESD);

(vii) A legislative or regulatory change results in new site information after EPA awards the TAG;

(viii) EPA expects a cleanup lasting more than eight years from the beginning of the RI/FS through construction completion;

(ix) Significant public concern exists, where large groups of people in the community require many meetings, copies, etc.; and

(x) Any other factor that, in EPA's judgment, indicates that the site is unusually complex.

(b) Your group can also receive more than \$50,000 if you are geographically

close to more than one eligible site (for example, two or more sites \times \$50,000 = grant of \$100,000) and your group wishes to receive funding for technical assistance to address multiple eligible sites.

What TAGs Can Pay For

§ 35.4070 How can my group spend TAG money?

(a) Your group must use all or most of your funds to procure a technical advisor(s) to help you understand the nature of the environmental and public health hazards at the site, the various stages of health and environmental investigations and activities, cleanup, and "operation and maintenance" of a site, including exposure investigation, health study, surveillance program, health promotion activities (for example, medical monitoring and pediatric health units), remedial investigation, and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, and removal action. This technical assistance should contribute to the public's ability to participate in the decision making process by improving the public's understanding of overall conditions and activities at the site.

(b) Your group may use a portion of your funds to:

(1) Undertake activities that communicate site information to the public through newsletters, public meetings or other similar activities;

(2) Procure a grant administrator to manage your group's grant; and/or

(3) Provide one-time health and safety training for your technical advisor to gain site access to your local Superfund site. To provide this training, you must:

(i) Obtain written approval from the EPA regional office; and

(ii) Not spend more than \$1,000.00 for this training, including travel, lodging and other related costs.

§ 35.4075 Are there things my group can't spend TAG money for?

Your TAG funds cannot be used for the following activities:

(a) Lawsuits or other legal actions;

(b) Attorney fees for services:

(1) Connected to any kind of legal action; or

(2) That could, if such a relationship were allowable, be interpreted as resulting in an attorney/client relationship to which the attorney/client privilege would apply;

(c) The time of your technical advisor to assist an attorney in preparing a legal action or preparing and serving as an expert witness at any legal proceeding;

(d) Political activity and lobbying that is unallowable under Office of Management and Budget (OMB)

Circular A-122, Cost Principles for Non-Profit Organizations (this restriction includes activities such as attempting to

influence the outcomes of any Federal, State or local election, referendum, initiative, or similar procedure through

in-kind or cash contributions, endorsements, or publicity, or attempting to influence the introduction

or passage of Federal or state legislation; your EPA regional office can supply you with a copy of this circular);

(e) Other activities that are unallowable under the cost principles stated in OMB Circular A-122 (such as costs of amusement, diversion, social activities, fund raising and ceremonials);

(f) Tuition or other training expenses for your group's members or your technical advisor except as § 35.4070(b)(3) allows;

(g) Any activities or expenditures for your group's members' travel;

(h) Generation of new primary data such as well drilling and testing, including split sampling;

(i) Reopening or challenging final EPA decisions such as:

- (1) Records of Decision; and/or
- (2) Disputes with EPA under its dispute resolution procedures set forth in 40 CFR 30.63 (see § 35.4245); and

(j) Generation of new health data through biomedical testing (for example, blood or urine testing), clinical evaluations, health studies, surveillance, registries, and/or public health interventions.

How You Get the Money

§ 35.4080 Does my group get a lump sum up front, or does EPA reimburse us for costs we incur?

(a) EPA pays your group by reimbursing you for “allowable” costs, which are costs that are:

- (1) Grant related;
- (2) “Allocable”;
- (3) “Reasonable”;
- (4) Necessary for the operation of the organization or the performance of the award.

(b) You will be reimbursed for the allowable costs up to the amount of the TAG if your group incurred the costs during the approved “project period” of the grant (except for allowable costs of incorporation which may be incurred prior to the project period), and your group is legally required to pay those costs.

§ 35.4085 Can my group get an “advance payment” to help us get started?

Yes, a maximum of \$5,000.00 in the form of an advance payment is available to new recipients.

§ 35.4090 If my group is eligible for an advance payment, how do we get our funds?

(a) Your group must submit in writing a request for an advance payment and identify what activities, goods or services your group requires.

(b) Your EPA regional office project officer identified in your award document must approve the items for which your group seeks advance funding.

(c) Upon approval of your request, EPA will advance cash (in the form of a check or electronic funds transfer) to your group, up to \$5,000, to cover its estimated need to spend funds for an initial period generally geared to your group’s cycle of spending funds.

(d) After the initial advance, EPA reimburses your group for its actual cash disbursements.

§ 35.4095 What can my group pay for with an advance payment?

(a) Advance payments may be used only for the purchase of supplies, postage, the payment of the first deposit to open a bank account, the rental of equipment, the first month’s rent of office space, advertisements for technical advisors and other items associated with the start up of your organization specifically requested in your advance payment request and approved by your EPA project officer.

(b) Advance payments must not be used for contracts for technical advisors or other contractors.

(c) Advance payments are not available for the costs of incorporation.

§ 35.4100 Can my group incur any costs prior to the award of our grant?

(a) The only costs you may incur prior to the award of a grant from EPA are

costs associated with incorporation but you do so at your own risk.

(b) If you are awarded a TAG, EPA may reimburse you for preaward incorporation costs or allow you to count the costs toward your matching funds requirement if the costs are:

- (1) Necessary and reasonable for incorporation; and
- (2) Incurred for the sole purpose of complying with this subpart’s requirement that your group be incorporated as a nonprofit corporation.

How to Apply for a TAG

§ 35.4105 What is the first step for getting a TAG?

To let EPA know of your group’s interest in obtaining a TAG, your group should first submit to its EPA regional office a Letter of Intent. (The addresses of EPA’s regional offices’ TAG Coordinators are listed in § 35.4275.)

§ 35.4106 What information should an LOI include?

The LOI should clearly state that your group intends to apply for a TAG, and should identify:

- (a) The name of your group;
- (b) The Superfund site(s) for which your group intends to submit an application; and
- (c) Provide the name of a contact person in the group and his or her mailing address and telephone number.

§ 35.4110 What does EPA do once it receives the first LOI from a group?

The following table shows what EPA does when it receives the first LOI from a group:

| If your site . . . | Then EPA . . . |
|--|--|
| (a) is not proposed for listing on the NPL or is proposed but no response is underway or scheduled to begin. | will advise you in writing that we are not yet accepting TAG “applications” for your site. EPA may informally notify other interested groups that it has received an LOI. |
| (b) Is listed on the NPL or is proposed for listing on the NPL and a response action is underway. | will publish a notice in your local newspaper to formally notify other interested parties that they may contact the first group that sent the LOI to form a coalition or they may submit a separate LOI. |

§ 35.4115 After the public notice that EPA has received an LOI, how much time does my group have to form a coalition or submit a separate LOI?

Your group has 30 days (from the date the public notice appears in your local newspaper) to submit documentation that you have formed a coalition with the first group and any other groups, or to submit a separate LOI. This 30-day

period is the first 30 days with which your group must be concerned.

§ 35.4120 What does my group do next?

(a) After you submit an LOI, one of the first steps in applying for your TAG is determining whether your state requires review of your grant application. This review allows your governor to stay informed about the

variety of grants awarded within your state. This process is called intergovernmental review. Your EPA regional office can provide you with the contact for your state’s intergovernmental review process.

(b) You should call that state contact as early as possible in the application process so that you can allow time for

this review process which may take up to 60 days.

(c) EPA cannot process your application package without evidence that you have submitted it to the state for review, if your state requires it.

(d) EPA cannot award a TAG until the state has completed its intergovernmental review.

§ 35.4125 What else does my group need to do?

Once you've determined your state's intergovernmental review requirements, you must prepare a TAG application on EPA SF-424, Application for Federal Assistance, or those forms and instructions provided by EPA that include:

- (a) A "budget";
- (b) A scope of work;
- (c) Assurances, certifications and other preaward paperwork as 40 CFR part 30 requires. Your EPA regional office will provide you with the required forms.

§ 35.4130 What must be included in my group's budget?

Your budget must clearly show how:

(a) You will spend the money and how the spending meets the objectives of the TAG project;

(b) Your group will provide the required cash and/or in-kind contributions; and

(c) Your group derived the figures included in the budget.

§ 35.4135 What period of time should my group's budget cover?

The period of time your group's budget covers (the "funding period" of your grant) will be:

- (a) One which best accommodates your needs;
- (b) Negotiated between your group and EPA; and
- (c) Stated in the "award document."

§ 35.4140 What must be included in my group's work plan?

(a) Your scope of work must clearly explain how your group:

- (1) Will organize;
- (2) Intends to use personnel you will procure for management/coordination and technical advice; and

(3) Will share and disseminate information to the rest of the affected community.

(b) Your scope of work must also clearly explain your project's milestones and the schedule for meeting those milestones.

(c) Finally, your scope of work must explain how your board of directors, technical advisor(s) and "project manager" will interact with each other.

§ 35.4145 How much time do my group or other interested groups have to submit a TAG application to EPA?

(a) Your group must file your application with your EPA regional office within the second 30 days after the date the public notice appears in your local newspaper announcing that EPA has received an LOI. This second 30-day period begins on the day after the first 30-day period § 35.4115 describes ends. EPA will only accept applications from groups that submitted an LOI within 30 days from the date of that public notice.

(b) If your group requires more time to file a TAG application, you may submit a written request asking for an extension. If EPA decides to extend the time period for applications in response to your request, it will notify, in writing, all groups that submitted an LOI of the new deadline for submitting TAG applications.

(c) EPA will not accept other applications or requests for extensions after the final application deadline has passed.

§ 35.4150 What happens after my group submits its application to EPA?

(a) EPA will review your application and send you a letter containing written comments telling you what changes need to be made to the application to make it complete.

(b) Your group has 90 days from the date on the EPA letter to make the changes to your application and resubmit it to EPA.

(c) Once the 90-day period ends, EPA will begin the process to select a TAG recipient, or, in the case of a single applicant, if, EPA does not receive a complete application (meaning, an application that does not have the changes provided in the letter described

in paragraph (b) of this section), then EPA will readvertise the fact that a TAG is available and the award process will begin again.

§ 35.4155 How does EPA decide whether to award a TAG to our group?

Once EPA determines your group meets the eligibility requirements in § 35.4020 the Agency considers whether and how successfully your group meets these criteria, each of which are of equal weight:

(a) Representation of groups and individuals affected by the site;

(b) Your group's plans to use the services of a technical advisor throughout the Superfund response action; and

(c) Your group's ability and plan to inform others in the community of the information provided by the technical advisor.

§ 35.4160 What does EPA do if more than one group applies for a TAG at the same site?

When multiple groups apply, EPA will rank each applicant relative to other applicants using the criteria in § 35.4155.

§ 35.4161 Does the TAG application process affect the schedule for work at my site?

No, the schedule for response activities at your site is not affected by the TAG process.

§ 35.4165 When does EPA award a TAG?

(a) EPA may award TAGs throughout the Superfund process, including during operation and maintenance, but we will not award a TAG before the start of your site's response action if the site is proposed for listing on the NPL.

(b) Based on the availability of funds, EPA may delay awards of grants to qualified applicants.

Managing Your TAG

§ 35.4170 What kinds of reporting does EPA require?

There are several types of reports you need to complete at various points during the life of your group's grant; the number varies based on whether you receive an advance payment:

| Type of report | Required information | Timing and frequency |
|--|---|---|
| (a) Federal Cash Transactions Report | The amount of funds advanced to you or electronically transferred to your bank account and how you spent those funds. | Semiannually within 15 working days following the end of the semiannual period which ends June 30 and December 31 of each year. |

| Type of report | Required information | Timing and frequency |
|---|--|---|
| (b) Minority-Owned Business Enterprise/Women-Owned Business Enterprise (MBE/WBE) Utilization. | Whether your group contracted with a MBE/WBE in the past Federal fiscal year, the value of the contract, if any, and the percentage of total project dollars on MBE/WBEs. | Annually, even if no contracts have been signed. |
| (c) Progress Report | Full description in chart or narrative format of the progress your group made in relation to your approved schedule, budget and the TAG project milestones, including an explanation of special problems your group encountered. | Quarterly, within 45 days after the end of each calendar quarter. |
| (d) Financial Status Report | Status of project's funds through identification of project transactions and within 90 days after the end of your TAG's funding period. | Annually, within 90 days after the anniversary date of the start of your TAG project. |
| (e) Final Report | Description of project goals and objectives, activities undertaken to achieve goals and objectives, difficulties encountered, technical advisors' work products and funds spent. | Within 90 days after the end of your project. |

§ 35.4175 What other reporting and record keeping requirements are there?

In addition to the report requirements § 35.4170 describes, EPA requires your group to:

- (a) Comply with any reporting requirements in the terms and conditions of the "grant agreement";
- (b) Keep complete financial records accurately showing how you used the Federal funds and the match, whether it is in the form of cash or in-kind assistance; and
- (c) Comply with any reporting and record keeping requirements in OMB Circular A-122 and 40 CFR part 30.

§ 35.4180 Must my group keep financial records after we finish our TAG?

(a) You must keep TAG financial records for ten years from the date of the final Financial Status Report, or until any audit, litigation, cost recovery, and/or disputes initiated before the end of the ten-year retention period are settled, whichever, is longer.

(b) At the ten-year mark, you may dispose of your TAG financial records if you first get written approval from EPA.

(c) If you prefer, you may submit the financial records to EPA for safekeeping when you give us the final Financial Status Report.

§ 35.4185 What does my group do with reports our technical advisor prepares for us?

You must send to EPA a copy of each final written product your advisor prepares for you as part of your TAG. We will send them to the local

Superfund site information repository(ies) where all site-related documents are available to the public.

Procuring a Technical Advisor or Other Contractor With TAG Funds

§ 35.4190 How does my group identify a qualified technical advisor?

(a) Your group must select a technical advisor who possesses the following credentials:

(1) Demonstrated knowledge of hazardous or toxic waste issues, relocation issues, redevelopment issues or public health issues as those issues relate to hazardous substance/toxic waste issues, as appropriate;

(2) Academic training in a relevant discipline (for example, biochemistry, toxicology, public health, environmental sciences, engineering, environmental law and planning); and

(3) Ability to translate technical information into terms your community can understand.

(b) Your technical advisor for public health issues must have received his or her public health or related training at accredited schools of medicine, public health or accredited academic institutions of other allied disciplines (for example, toxicology).

(c) Your group should select a technical advisor who has experience working on hazardous or toxic waste problems, relocation, redevelopment or public health issues, and communicating those problems and issues to the public.

§ 35.4195 Are there certain people my group cannot select to be our technical advisor, grant administrator, or other contractor under the grant?

Your group may not hire the following:

(a) The person(s) who wrote the specifications for the "contract" and/or who helped screen or select the contractor;

(b) In the case of a technical advisor, a person or entity doing work for the Federal or State government or any other entity at the same NPL site for which your group is seeking a technical advisor; and

(c) Any person who is on the List of Parties Excluded from Federal Procurement or NonProcurement Programs.

§ 35.4200 What restrictions apply to contractors my group procures for our TAG?

When procuring contractors your group:

(a) Cannot award cost-plus-percentage-of-cost contracts; and

(b) Must award only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed contract.

§ 35.4205 How does my group procure a technical advisor or any other contractor?

When procuring contractors your group must also:

(a) Provide opportunity for all qualified contractors to compete for your work (see § 35.4210);

- (b) Keep written records of the reasons for all your contracting decisions;
- (c) Make sure that all costs are reasonable in a proposed contract;
- (d) Inform EPA of any proposed contract over \$1,000.00;
- (e) Provide EPA the opportunity to review a contract before your group awards or amends it;
- (f) Perform a "cost analysis" to evaluate each element of a contractor's cost to determine if it is reasonable, allocable and allowable for all contracts over \$25,000; and
- (g) Comply with the small business enterprises (SBE), minority-owned business enterprises, women-owned business enterprise requirements in 40 CFR 30.44(b) which outlines steps your group must take to make positive efforts to use small businesses, minority-owned

- firms and women's business enterprises. These steps generally say:
 - (1) Make sure to use small businesses, minority-owned firms, and women's businesses as often as possible.
 - (2) Make information on upcoming opportunities available and plan time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.
 - (3) When procuring firms for larger contracts, consider whether those firms intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.
 - (4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of those to handle on its own.

- (5) Use the services and help, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.
- (6) If your contractor awards a contract, require the contractor to take the steps in 40 CFR 30.44(b) as summarized in paragraphs (g)(1) through (5) of this section.

§ 35.4210 Must my group solicit and document bids for our procurements?

- (a) The steps needed to be taken to procure goods and/or services depends on the amount of the proposed procurement:

| If the aggregate amount of the | Then your group |
|---|---|
| (1) purchase is \$1,000 or less | may make the purchase as long as you make sure the price is reasonable; no oral or written bids are necessary. |
| (2) proposed contract is over \$1,000 but less than \$25,000 | must obtain and document oral or written bids from two or more qualified sources. |
| (3) proposed contract is \$25,000 to \$100,000 | must: <ul style="list-style-type: none"> (i) Solicit written bids from three or more sources who are willing and able to do the work; (ii) Provide potential sources in the scope of work to be performed and the criteria your group will use to evaluate the bids; (iii) Objectively evaluate all bids; and (iv) Notify all unsuccessful bidders. |
| (4) proposed contract is greater than \$100,000 | must follow the procurement regulations in 40 CFR part 30 (these regulations outline the standards for your group to use when contracting for services with Federal funds; they also contain provisions on: codes of conduct for the award and administration of contracts; competition; procurement procedures; cost and price analysis; procurement records; contract administration; and contracts generally). |

- (b) Your group must not divide any procurements into smaller parts to get under any of the dollar limits in paragraph (a) of this section.

§ 35.4215 What if my group can't find an adequate number of potential sources for a technical advisor or other contractor?

In situations where only one adequate bidder can be found, your group may request written authority from the EPA award official to contract with the sole bidder.

§ 35.4220 How does my group ensure a prospective contractor does not have a conflict of interest?

Your group must require any prospective contractor on any contract to provide, with its bid or proposal:

- (a) Information on its financial and business relationship with all PRPs at the site, with PRP parent companies, subsidiaries, affiliates, subcontractors, contractors, and current clients or attorneys and agents. This disclosure requirement includes past and anticipated financial and business relationships, and services provided to or on behalf of such parties in connection with any proposed or pending litigation;

- (b) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

- (c) A statement that it will disclose to you immediately any such information discovered after submission of its bid or after award.

§ 35.4225 What if my group decides a prospective contractor has a conflict of interest?

If, after evaluating the information in § 35.4220, your group decides a prospective contractor has a significant

conflict of interest that cannot be avoided or otherwise resolved, you must exclude him or her from consideration.

§ 35.4230 What are my group's contractual responsibilities once we procure a contractor?

For contractual responsibilities, your group, not EPA:

(a) Is responsible for resolving all contractual and administrative issues arising out of contracts you enter into under a TAG; you must establish a procedure for resolving such issues with your contractor which complies with the provisions of 40 CFR 30.41. These provisions say your group, not EPA, is responsible for settling all issues related to decisions you make in procuring advisors or other contractors with TAG funds; and

(b) Must ensure your contractor(s) perform(s) in accordance with the terms and conditions of the contract.

§ 35.4235 Are there specific provisions my group's contract(s) must contain?

Your group must include the following provisions in each of its contracts:

(a) Statement of work;
 (b) Schedule for performance;
 (c) Due dates for deliverables;
 (d) Total cost of the contract;
 (e) Payment provisions;
 (f) The following clauses from 40 CFR part 30, appendix A, which your EPA regional office can provide to you:

(1) Equal Employment Opportunity; and
 (2) Suspension and Debarment;
 (g) The following clauses from 40 CFR 30.48:

(1) Remedies for breaches of contract (40 CFR 30.48(a));
 (2) Termination by the recipient (40 CFR 30.48(b)); and
 (3) Access to records (40 CFR 30.48(d)); and

(h) Provisions that require your contractor(s) to keep the following detailed records as § 35.4180 requires for ten years after the end of the contract:

(1) Acquisitions;
 (2) Work progress reports;
 (3) Expenditures; and
 (4) Commitments indicating their relationship to established costs and schedules.

Requirements for TAG Contractors

§ 35.4240 What provisions must my group's TAG contractor comply with if it subcontracts?

A TAG contractor must comply with the following provisions when awarding subcontracts:

(a) Section 35.4205 (b) pertaining to documentation;

(b) Section 35.4205 (c) and (f) pertaining to cost;

(c) Section 35.4195 (c) pertaining to suspension and debarment;

(d) Section 35.4200 (b) pertaining to responsible contractors;

(e) Section 35.4205 (g) pertaining to disadvantaged business enterprises;

(f) Section 35.4200 (a) pertaining to unallowable contracts;

(g) Section 35.4235 pertaining to contract provisions; and

(h) Cost principles in 48 CFR part 31, the Federal Acquisition Regulation, if the contractor and subcontractors are profit-making organizations.

Grant Disputes, Termination, and Enforcement

§ 35.4245 How does my group resolve a disagreement with EPA regarding our TAG?

The regulations at 40 CFR 30.63 and 31.70 will govern disputes except that, before you may obtain judicial review of the dispute, you must have requested the Regional Administrator to review the dispute decision official's determination under 40 CFR 31.70(c), and, if you still have a dispute, you must have requested the Assistant Administrator for the Office of Solid Waste and Emergency Response to review the Regional Administrator's decision under 40 CFR 31.70(h).

§ 35.4250 Under what circumstances would EPA terminate my group's TAG?

(a) EPA may terminate your grant if your group materially fails to comply with the terms and conditions of the TAG and the requirements of this subpart.

(b) EPA may also terminate your grant with your group's consent in which case you and EPA must agree upon the termination conditions, including the effective date as 40 CFR 30.61 describes.

§ 35.4255 Can my group terminate our TAG?

Yes, your group may terminate your TAG by sending EPA written notification explaining the reasons for the termination and the effective date.

§ 35.4260 What other steps might EPA take if my group fails to comply with the terms and conditions of our award?

EPA may take one or more of the following actions, under 40 CFR 30.62, depending on the circumstances:

(a) Temporarily withhold advance payments until you correct the deficiency;

(b) Not allow your group to receive reimbursement for all or part of the activity or action not in compliance;

(c) Wholly or partly "suspend" your group's award;

(d) Withhold further awards (meaning, funding) for the project or program;

(e) Take enforcement action;

(f) Place special conditions in your grant agreement; and

(g) Take other remedies that may be legally available.

Closing Out a TAG

§ 35.4265 How does my group close out our TAG?

(a) Within 90 calendar days after the end of the approved project period of the TAG, your group must submit all financial, performance and other reports as required by § 35.4180. Upon request from your group, EPA may approve an extension of this time period.

(b) Unless EPA authorizes an extension, your group must pay all your bills related to the TAG by no later than 90 calendar days after the end of the funding period.

(c) Your group must promptly return any unused cash that EPA advanced or paid; OMB Circular A-129, Policies for Federal Credit Programs and Non-Tax Receivables, governs unreturned amounts that become delinquent debts.

Other Things You Need To Know

§ 35.4270 Definitions.

The following definitions apply to this subpart:

Advance payment means a payment made to a recipient before "outlays" are made by the recipient.

Affected means subject to an actual or potential health, economic or environmental threat. Examples of affected parties include people:

(1) Who live in areas near NPL facilities, whose health may be endangered by releases of hazardous substances at the facility; or
 (2) Whose economic interests are threatened or harmed.

Affiliated means a relationship between persons or groups where one group, directly or indirectly, controls or has the power to control the other, or, a third group controls or has the power to control both. Factors indicating control include, but are not limited to:

(1) Interlocking management or ownership (e.g., centralized decisionmaking and control);
 (2) Shared facilities and equipment; and
 (3) Common use of employees.

Allocable cost means a cost which is attributable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relative benefits received. A cost is allocable to a Government award if it is treated consistently with other

costs incurred for the same purpose in like circumstances and if it:

(1) Is incurred specifically for the award;

(2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received; or

(3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

Allowable cost means those project costs that are: eligible, reasonable, allocable to the project, and necessary to the operation of the organization or the performance of the award as provided in the appropriate Federal cost principles, in most cases OMB Circular A-122 (see 40 CFR 30.27), and approved by EPA in the assistance agreement.

Applicant means any group of people that files an application for a TAG.

Application means a completed formal written request for a TAG that you submit to a State or the EPA on EPA form SF-424, Application for Federal Assistance (Non-construction Programs).

Award document or grant agreement is the legal document that transfers money or anything of value to your group to accomplish the purpose of the TAG project. It specifies funding and project periods, EPA's and your group's budget share of "eligible costs," a description of the work to be accomplished, and any additional terms and conditions that may apply to the grant.

Award Official means the EPA official who has the authority to sign grant agreements.

Budget means the financial plan for spending all Federal funds and your group's matching share funds (including in-kind contributions) for a TAG project that your group proposes and EPA approves.

Cash contribution means actual non-Federal dollars, or Federal dollars if expressly authorized by Federal statute, that your group spends for goods, services, or personal property (such as office supplies or professional services) used to satisfy the matching funds requirement.

Contract means a written agreement between your group and another party (other than a public agency) for services or supplies necessary to complete the TAG project. Contracts include contracts and subcontracts for personal and professional services or supplies necessary to complete the TAG project.

Contractor means any party (for example, a technical advisor) to whom your group awards a contract.

Cost analysis is the evaluation of each element of cost to determine whether it is reasonable, allocable, and allowable.

Eligible cost is a cost permitted by statute, program guidance or regulations.

EPA means the Environmental Protection Agency.

Explanation of Significant Differences (ESD) means the document issued by the agency leading a cleanup that describes to the public significant changes made to a Record of Decision after the ROD has been signed. The ESD must also summarize the information that led to the changes and affirm that the revised remedy complies with the "National Contingency Plan" (NCP) and the statutory requirements of CERCLA.

Federal facility means a facility that is owned or operated by a department, agency, or instrumentality of the United States.

Funding period (previously called a "budget period") means the length of time specified in a grant agreement during which your group may spend Federal funds. A TAG project period may be comprised of several funding periods.

Grant agreement or award document is the legal document that transfers money or anything of value to your group to accomplish the purpose of the TAG project. It specifies funding and project periods, EPA's and your group's budget share of eligible costs, a description of the work to be accomplished, and any additional terms and conditions that may apply to the grant.

In-kind contribution means the value of a non-cash contribution used to meet your group's matching funds requirement in accordance with 40 CFR 30.23. An in-kind contribution may consist of charges for equipment or the value of goods and services necessary to the EPA-funded project.

Letter of intent (LOI) means a letter addressed to your EPA regional office which clearly states your group's intention to apply for a TAG. The letter tells EPA the name of your group, the Superfund site(s) for which your group intends to submit an application, and the name of a contact person in the group including a mailing address and telephone number.

Matching funds means the portion of allowable project cost contributed toward completing the TAG project using non-Federal funds or Federal funds if expressly authorized by Federal statutes. The match may include in-kind as well as cash contributions.

National Contingency Plan (NCP) means the federal government's blueprint for responding to both oil

spills and hazardous substance releases. It lays out the country's national response capability and promotes overall coordination among the hierarchy of responders and contingency plans.

National Priorities List (NPL) means the Federal list of priority hazardous substance sites, nationwide. Sites on the NPL are eligible for long-term cleanup actions financed through the Superfund program.

Operable unit means a discrete action defined by EPA that comprises an incremental step toward completing site cleanup.

Operation and maintenance means the steps taken after site actions are complete to make certain that all actions are effective and working properly.

Outlay means a charge made to the project or program that is an allowable cost in terms of costs incurred or in-kind contributions used.

Potentially responsible party (PRP) means any individual(s) or company(ies) (such as owners, operators, transporters or generators) potentially responsible under sections 106 or 107 of CERCLA (42 U.S.C. 9606 or 42 U.S.C. 9607) for the contamination problems at a Superfund site.

Project manager means the person legally authorized to obligate your group to the terms and conditions of EPA's regulations and the grant agreement, and designated by your group to serve as its principal contact with EPA.

Project period means the period established in the TAG award document during which TAG money may be used. The project period may be comprised of more than one funding period.

Reasonable cost means a cost that, in its nature or amount, does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs.

Recipient means any group that has been awarded a TAG.

Record of decision (ROD) means a public document that explains the cleanup method that will be used at a Superfund site; it is based on technical data gathered and analyses performed during the remedial investigation and feasibility study, as well as public comments and community concerns.

Remedial investigation/feasibility study (RI/FS) means the phase during which EPA conducts risk assessments and numerous studies into the nature and extent of the contamination on site, and analyzes alternative methods for cleaning up a site.

Response action means all activities undertaken by EPA, other Federal agencies, States, or PRPs to address the

problems created by hazardous substances at an NPL site.

Start of response action means the point in time when funding is set-aside by either EPA, other Federal agencies, States, or PRPs to begin response activities at a site.

Suspend means an action by EPA that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under Federal agency regulations implementing Executive Orders 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), Debarment and Suspension.

§ 35.4275 Where can my group get the documents this subpart references (for example, OMB circulars, other subparts, forms)?

EPA Headquarters and the regional offices that follow have the documents this subpart references available if you need them:

(a) TAG Coordinator or Grants Office, U.S. EPA Region I, John F. Kennedy Federal Building, Boston, MA 02203.

(b) TAG Coordinator or Grants Office, U.S. EPA Region II, 290 Broadway, New York, NY 10007-1866.

(c) TAG Coordinator or Grants Office, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19106.

(d) TAG Coordinator or Grants Office, U.S. EPA Region IV, Atlanta Federal Center, 61 Forsyth Street, Atlanta, GA 30303.

(e) TAG Coordinator or Grants Office, U.S. EPA Region V, Metcalfe Federal Building, 77 W. Jackson Blvd., Chicago, IL 60604.

(f) TAG Coordinator or Grants Office, U.S. EPA Region VI, Wells Fargo Bank, Tower at Fountain Place, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202-2733.

(g) TAG Coordinator or Grants Office, U.S. EPA Region VII, 901 N. 5th Street, Kansas City, KS 66101.

(h) TAG Coordinator or Grants Office, U.S. EPA Region VIII, 999 18th Street, Suite #500, Denver, CO 80202-2466.

(i) TAG Coordinator or Grants Office, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

(j) TAG Coordinator or Grants Office, U.S. EPA Region X, 1200 6th Avenue, Seattle, WA 98101.

(k) National TAG Coordinator, U.S. EPA Mail Code: 5204-G, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

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